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No. 167.

Brf. of Avery for Appellants.

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No. ~~171~~ 167

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *Et Al.*, APPELLANTS,

versus

W. N. COLER & COMPANY, APPELLEES.

On a Certificate from the United States Circuit Court of Appeals from the Fourth Circuit.

Brief of A. C. AVERY, Counsel for Appellants.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

No. 471.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *Et Al.*, APPELLANTS,

versus

W. N. COLER & COMPANY, APPELLEES.

On a Certificate from the United States Circuit Court of Appeals from the Fourth Circuit.

Brief of A. C. AVERY, Counsel for Appellants.

The certificate of Circuit Court Judges is as follows:

Upon the hearing on the Circuit, the decree, as above set out, was entered in favor of the complainants. Whereupon, the suit was taken by appeal to this, the Circuit Court of Appeals for the Fourth Circuit, before the undersigned; and said Court desiring, for its proper decision, the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit:

Now, therefore, we, the undersigned, do hereby certify said questions or propositions of law to the Supreme Court of the United States for instruction as aforesaid:

First. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits and other

evidence, and matters and things recited herein, the Circuit Court of the United States was bound, in passing upon this case, by the decisions of the Supreme Court of North Carolina in the following cases—

Commissioners of Wilkes County *v.* Clarence Call *et. al.*, 123 N. C. Rep., 308;
Bank *v.* Commissioners, 119 N. C. Rep., 214;
Commissioners *v.* Snuggs, 121 N. C. Rep., 394;
Rodman *v.* Washington, 122 N. C. Rep., 39;
Commissioners *v.* Payne, 123 N. C. Rep., 432,

considered in connection with prior decisions of said Court, and the following provisions of the Constitution of said State:

Art. 2, secs. 14 and 16, and Art. 5, secs. 1, 4, 6 and 7, and Art. 7, sec. 7.

Second. Whether, if the bonds in coupons in question were issued, put in circulation and came to the hands of complainants, appellees, in due course of trade, for valuable consideration, and without notice, and if there were at that time no decision of the Supreme Court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

Third. Whether there was any decision adverse to the validity of these bonds or identical bonds, or any construction of the Constitution or law of North Carolina, which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice, other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State, of their invalidity.

THE ORIGIN OF THE CONTROVERSY WHICH GIVES RISE TO THE REQUEST FOR INSTRUCTIONS.

In *Bank* v. *Commissioners*, 119 N. C., 214, the Supreme Court of North Carolina for the first time construed and held to be mandatory a certain provision of the Constitution of that State, ratified on the 24th day of April, 1868, which is as follows:

Art. 2, sec. 14: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or *to allow the counties, cities or towns to do so*, unless the bill for that purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which reading shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

Some other restrictive provisions of the said Constitution, which took effect on the 24th of April, 1868, and which are pertinent to the inquiries, are as follows:

Art. 7, sec. 7: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the qualified voters therein."

Art. 5, sec. 1: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash. * * * The State and county capitation tax shall never exceed two dollars on the head."

Art. 5, sec. 6: "The taxes levied by the Commissioners

of the several counties shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose and with the special approval of the General Assembly.*"

Art. 5, sec. 7: "Every act of the General Assembly *levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other.*"

IT WAS THE DUTY OF THE COURT TO PRONOUNCE THE ENABLING ACT VOID, AND IT CORRECTLY HELD THAT THE PURCHASERS OF BONDS ISSUED UNDER SUCH AUTHORITY TOOK THEM WITH CONSTRUCTIVE NOTICE.

Chief Justice Dillon, delivering the opinion of the Supreme Court of Iowa in a celebrated case, said:

"But when a law is a plain and clear violation of a constitutional provision, it is the duty of a judge so to declare, be the consequences what they may."

"Of what value, indeed, would be the boasted American idea of *securing private rights, and the rights of the minority (for it is usually the minority and not the majority that needs protection) by constitutional limitations on the power of the Legislature, i. e., on the power of the majority, if no tribunal existed to decide when the Legislature disregarded these limitations, or if the tribunal charged with this most delicate yet most important duty fails fearlessly to perform it.*"

Hanson *v.* Vernon (27 Iowa, 28), 1 Am. Rep., at page 224.

The foregoing citation is made, not to establish the admitted doctrine, that, where an act is clearly unconstitutional, it is the duty of the courts to so declare; but because the eminent judge calls attention so sharply to the duty of courts to enforce mandatory provisions inserted in the organic law for the protection of helpless minorities of

taxpayers from burdens such as the appellees are seeking to impose upon the taxpayers of Wilkes County.

The language of sec. 14, art. 2 of the Constitution was so clearly mandatory and its meaning was so obvious as to require no interpretation, and hence it had been assumed by the people of the State, and the courts were bound to assume, in the absence of affirmative proof to the contrary, that all legislators had been doing what watchful representatives did do, viz, had been careful to see that the requirements of sec. 14, art. 2 were complied with both in the mode of enacting statutes and the record entered upon the Journals.

Not only was the meaning of the language used unmistakable, and so declared to be by the Supreme Court of North Carolina; but, eight years before the bonds in controversy were issued, the Supreme Court of the United States held in a case brought up by writ of error, *not from the State Court, but from the Circuit Court of the United States*, that it was bound to follow the decisions of the Supreme Court of Illinois, interpreting and enforcing a provision in the organic law of that State similar in its nature but not so rigid in its requirements. The language of the Constitution of Illinois, which gave rise to the controversy in that case, was as follows:

"Sec. 3: Each House shall keep a Journal of its proceedings and publish them," etc.

"Sec. 21. * * * On the final passage of all bills the votes shall be by ayes and nays, and shall be entered upon the Journals, and no bill shall become a law without the concurrence of a majority of the members-elect in each House."

Sec. 14, art. 2 of the Constitution of North Carolina declares statutes of the class in question invalid unless read upon three different days and unless the Journal shows that a majority voted for their passage *both on the second and third readings.*

Sec. 16, art. 2 of the Constitution of North Carolina is as follows:

"Each House shall keep a Journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

In the case brought up from the Circuit Court of the Northern District of Illinois, the Court said:

"The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision."

"An act of the Legislature of the State, which has been held by its highest court not to be a statute of a State, because never passed as its Constitution requires, can not be held by the courts of the United States, upon the same evidence, to be a law of the State."

"That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value, and in the belief that they have been lawfully issued."

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., 667 (L. C. Ed. B. 26, page 1205).

That case has never been overruled or cited except with approval, and our case can not be distinguished from it, under the rule as stated in *Turner* v. *Board of Commissioners*, 173 U. S., 461, since both were brought up from the Circuit Court of Federal Districts in the manner provided by law to the proper appellate court. "The distinction, as to the authority of this court, between writs of error to the courts of the United States and writs of error to the highest court of a State," does not apply.

The case of *Amoskeag Nat. Bank* v. *Ottawa* had been cited with approval and had been followed in a number of decisions rendered before the bonds were issued, on the ... day of ....., 1890.

Claiborne *v.* Brooks, 111 U. S., 410.
Norton *v.* Shelby County, 118 U. S., 45.
Leper *v.* Texas, 139 U. S., 167.

The adjudication, in *Amoskeag Nat. Bank* v. *Ottawa, supra*, followed two previous rulings, where actions had been brought up by writ of error in the same way and *from the same Circuit Court, and involving a construction of the same constitutional provision.* In rendering the opinion in these two cases Justice Bradley used strong language, to which the attention of the Court is especially invited:

"If, therefore, *the law in question had never been passed upon by the State courts, the courts of the United States would, nevertheless, be bound to give to the Constitution of Illinois the same construction which the State courts give to it, and to hold a pretended act of the Legislature void and not a law* which the State Court would hold to be so. * * * But the law under consideration has been passed upon by the Supreme Court of Illinois and held to be invalid. *This ought to have been sufficient to have governed the action of the Court below.*"

South Ottawa *v.* Perkins, 94 U. S., 260 (L. C. Ed. B. 24, at pages 157, 158).
Supervisors *v.* Post, *Id.*

"Authorities are not required to support the *general proposition* that, in consideration of the Constitution or laws of the State, this Court gives the construction given to those instruments by the highest court of a State."

Wilson *v.* State, 169 U. S., 586, 592.

THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA.

When proof of a failure to comply with sec. 14, art. 2, in the enactment of an enabling statute, relied on as authority for issuing municipal bonds, was first offered on

the trial of issues involving the validity of such bonds, that Court construed the Constitution of North Carolina as Justice Bradley said the Supreme Court of the United States would have been bound to interpret a similar provision in the Constitution of Illinois, even if the courts of that State had not previously passed upon it. That Court declared that such a pretended statute was no law, in the following cases, which are cited in the order in which the decisions were rendered, to-wit:

Bank *v.* Commissioners, 119 N. C. Rep., 214.
Commissioners *v.* Snuggs, 121 N. C. Rep., 394.
Rodman *v.* Washington, 122 N. C Rep , 39.
Commissioners of Wilkes County *v.* Call *et al.*, 123 N. C. Rep., 308.
Commissioners of Buncombe *v.* Payne, 123 N. C. Rep., 432.

If the general rule prevail, therefore, the rights of the purchasers of bonds issued under such defective power were not impaired by a construction of the Constitution which followed a previous declaration of the Court, whose province it is to determine when contracts are impaired. The purchaser of such bonds took them with notice of the local laws affecting the validity of the contract, and especially with notice that the presumption of regularity in the passage of the statutes, enacted after April 24, 1868, and relied upon as authority for issuing the bonds, was rebutted by the legislative histories recorded in the Journals. Even bona fide holders of bonds issued under such defective powers have no right to recover upon them.

Brenham *v.* Bank, 144 U. S., 173, 182, 188.
Lewis *v.* Pina County, 155 U. S., 54, 58.
Merrill *v.* Montecello, 138 U. S., 673, 681, 682.
Daves County *v.* Dickinson, 117 U. S., 657.
Hopper *v.* Covington, 118 U. S., 148, 151.
Doon *v.* Cummons, 142 U. S., 376.

THE ENABLING ACTS RELIED UPON AS AUTHORITY FOR CREATING THE DEBT WILL BE FOUND IN THE PRINTED RECORD AS FOLLOWS:

1. Original charter of Northwestern North Carolina Railroad, enacted by the Constitutional Convention of 1868, March 9, 1868. (See p. 24, *et seq.*)

2. An act of the General Assembly, ratifying and confirming that charter. (See p. 27, *et seq.*)

3. Amendment of February 20, 1879, at page 39 *et seq.*

4. Amendment of March 2, 1881. (P. 31, *et seq.*)

5. Secs. 1996 to 2000 of The Code of North Carolina, at page 28.

While the appellants maintain that the ruling of the Court, that the holders of bonds are estopped from setting up any statute, except that recited in the bonds (the Act of March 20, 1879), as authority for issuing them, was correct, they contend, also, that the Court was equally free from error in holding (in *Commissioners* v. *Call*, *supra*), that neither the orignal charter nor any of the amendments thereto, nor the sections of The Code cited above, empowered the Commissioners of Wilkes County to create the debt.

THE SUPREME COURT WAS BOUND TO FOLLOW THE RULINGS IN THE STATE COURTS AS TO THESE ACTS, FOR THE REASONS—

1. That it was shown by the legislative Journals that neither of the amendatory acts—of August 11, 1868, of February 20, 1879, or of March 2, 1881—was passed in the manner prescribed in art. 2, sec. 14 of the Constitution of North Carolina.

Transcript of Journal, printed record, page 34, *et seq.*
Extracts from printed Journal of Legislature, record, page 40 (admitted to present correct legislative history by agreement of counsel, printed record, p. 34).

Judge Golf, delivering the opinion of the Circuit Court of Appeals of the Fourth Circuit, August, 1899, in the case of *Commissioners of Stanly* v. *Coler*, followed the rule laid down by the Supreme Court of the United States in *Supervisors* v. *Post*, *supra*, and *Amoskeag Nat. Bank* v. *South Ottowa*, in passing upon the validity of certain bonds, issued by Stanly County, North Carolina, and containing a recital that they were issued by authority of a certain amendment to the charter of a railroad company, which it was admitted was not enacted in accordance with the requirements of art. 2, sec. 14, of the Constitution, and recited also secs. 1996 to 2000 of The Code. (See printed record, p. 28.) The Court said on that appeal, which now awaits the decision in the case at bar: "The people of the State, in their Constitution, have expressly limited the power of their Legislature relating to taxation, and pointed out the *certain indispensable prerequisites that must not only exist as a fact, but also appear in the Journals of that* Legislature in a certain way. The Constitution thus, in plain words, clearly indicates *the way, and the only way*, that the Legislature can authorize the counties and the cities of the State to exercise the power of taxation. The entry of the yeas and nays on the last two readings must appear on the Journal in order to comply with the Constitution, and unless they do appear the bill has not become a law, and the evidence of its nullity is the Journal provided by that Constitution itself. * * * The questions raised by this appeal, and the legislation involved with the same have been directly considered by the Supreme Court of the State of North Carolina, and the decisions of that Court have been against the contention of the complainants below.

"Union Bank of Richmond *v.* Commissioners of Town of Oxford, 119 N. C., 214; 25 S. E., 966.

"Board of Commissioners of Stanly County *et. al.* *v.* Snuggs, County Treasurer, 121 N. C., 394: 28 S. E., 539.

"City of Charlotte *v.* Shephard, 120 N. C., 411; 27 S. E., 109.

"Redman *v.* Town of Washington, 122 N. C., 39; 30 S. E., 118.

"Board of Commissioners of Wilkes County *v.* Call *et. al.*, 31 S. E., 481—

"in which case it was also held that secs. 1996–2000 of The Code of North Carolina, authorizing County Commissioners to subscribe stock to a railroad company when necessary to aid in the completion of a railroad, do not include a railroad not commenced before the Constitution was adopted."

The rulings of the State's highest appellate court, that a statute is consistent with a provision of its Constitution (and upon the same principle that it is inconsistent with its organic law), is conclusive upon the Federal tribunal.

Merchants, etc., Bank *v.* Pennsylvania, 167 U. S.,112.

"It must be regarded as a settled question, that whether statutes of a Legislature of a State have been duly enacted in accordance with the requirements of the Constitution of each State is not a Federal question, and the decision of the State courts, as to what are the laws of a State, are binding upon the courts of the United States."

Leiper *v.* Texas, 139 U. S., 167.

The decision of the State Court in this case can not be reviewed unless it clearly appears that a right claimed under the Constitution, sec. 10, art. 1, has been impaired by the adjudication complained of.

Cooley Con. Lim. (6th Ed.), 20, 21, 22, and note on page 310.

Fall Brook Irrig. Dist. *v.* Bradley, 164 U. S., 112.

While it may be true that the Court will be inclined to uphold the validity of bonds in the hands of innocent purchasers, this rule does not prevail where the highest court of a State has held that the authority to create the debt does not exist. In such cases any doubt as to the existence of the power "ought to be determined against its existence."

Brenham *v.* Bank, 114 U. S., 173, 182, 188.

"The Federal Court will lean toward an agreement of views with the State Court if the question seems to them balanced with doubt."

Burgess *v.* Seligman, 107 U. S., 20.

THE ONLY EXCEPTION TO THE GENERAL RULE AS TO JURISDICTION.

The rule cited in the cases relied on by appellees to show that Federal Courts are at liberty to disregard and overrule the decision of the Supreme Court of the State is as follows:

"So where contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. *But even in such cases, for the sake of harmony and to avoid confusion, the Federal Court* will lean towards an agreement of views with the State courts *if the question seems to them balanced with doubt.*"

Burgess *v.* Seligman, 107 U. S., 20.

LATER STATEMENT OF RULE.

"The construction by the courts of a State of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think the Supreme Court of a State has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That Court is the final arbiter as to such questions. In *Clairborne County* v. *Brooks*, 111 U. S., 400, 410 (28: 470, 474), it was said: 'It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State.' See also,

"Burgess *v.* Seligman, 107 U. S., 20, 33 (27: 359, 365).

"Bucher *v.* Cheschire R. Co., 125 U. S., 555 (31, 795).

"Detroit *v.* Osborne, 135 U. S., 492 (34, 260).

"South Branch Lumber Co. *v.* Ott, 142 U. S., 622 (35, 1136).

"Kaukauna Water Power Co. *v.* Green Bay and M. Canal Co., 142 U. S., 254 (35, 1004).

"McElvaine *v.* Brush, 142 U. S., 155 (35, 971).

"Sturman County *v.* Wallace, 142 U. S., 283 (35, 1018), quoting

"Norton *v.* Shelby County, 118 U. S., 425 (30, 178); and

"Gormley *v.* Clark, 134 U. S., 338, (33, 909).

"Morkey *v.* Lake Shore and M. S. R. Co., 146 U. S., 162 (36, 925).

"Bauserman *v.* Blunt, 147 U. S., 647 (37, 316).

"May *v.* Tenney, 148 U. S., 60 (37, 368).

"Baltimore and O. R. Co. *v.* Baugh, 149 U. S., 368, 373 (37: 772, 776).

"Lewis *v.* Monson, 151 U. S., 454 (38, 265).

"Balkham *v.* Woodstock Iron Co., 154 U. S., 177 (38, 953), quoting

"Leffingwell *v.* Warren, 67 U. S., 2 Black, 599, 603 (17: 261, 262)."

"It is conceded that the judgment of the Supreme Court of Indiana in this controversy could not be reviewed by the Court on writ of error; that the questions involved and decided by that Court are not of a Federal nature, or such as to invest any appellate jurisdiction in this Court. But if this Court can not set aside such judgment on the ground of error of law *it would seem to follow that no subordinate Federal Court has the power on the same ground to strike it down.* What the highest court of the United States can not do directly would seem to be beyond the reach of a subordinate court in collateral attack. The case of *Burgess* v. *Seligman, supra*, is largely relied upon in the opinion of the Court of Appeals, but there are several reasons why that authority does not justify its action. *In the first place the decision of the Supreme Court of the State was rendered before the filing of this bill in the Circuit Court of the United States, and not as in the Burgess case after the judgment in the Circuit Court.* In the second place, the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of *res judicata.*"

Forsyth *v.* Hammond, 166 U. S., 506, 518, 619, 520 (L. C. P. Co., p. 1100).

"The existence of the two coordinate jurisdictions in the same territory is peculiar, and the results would be anom-

alous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declaration of what the law is. But where the law had not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence."

Folsom *v.* Township Ninety-Six, 159 U. S., 611.
Douglass *v.* Pike County, 101 U. S., 677.

The case of *Gelpcke* v. *Dubuque*, 1 Wall., 175, lays down the same rule. The Court said:

"However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.'

"Ohio Life and Trust Co. *v.* Debolt, 16 How., 432.

"The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere."

That expounder of the Constitution, Justice Miller, stated the undisputed general principle in his dissenting opinion in that case as follows:

"The general principle is not controverted by the majority that to the highest courts of the State belong the right to construe its statutes and its Constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State Court that this Court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled and is as necessary to the harmonious working of our complex system of government as the correlative proposition that to this Court belongs the right to expound conclusively for all other courts the Constitution and laws of the Federal Government.

"Shelby *v.* Guy, 11 Wheat., 361.
"McCluny *v.* Silliman, 3 Pet., 278.
"Van Rensselaer *v.* Kearney, 11 How., 296.
"Webster *v.* Cooper, 14 How., 504.
"Elmendorf *v.* Taylor, 10 Wheat., 152.
"Bank *v.* Dudley, 2 Pet., 492."

JUDGE SIMONTON ERRED IN HOLDING SECS. 1996 TO 2000 OF THE CODE (ACT OF 1868–69) TO FALL WITHIN THE EXCEPTION TO THE GENERAL RULE.

The contention that the decisions rendered before *Bank* v. *Commissioners*, 119 N. C., 214, were in conflict with it, has been sustained by no court or judge except Judge Purnell. On the other hand, neither Judge Simonton nor Judge Purnell held that The Code, secs. 1996 to 2000, had been construed differently prior to the decision in *Commissioners* v. *Snuggs*, 121 N. C., 394. But Judge Simonton, in the Stanly case in the Circuit Court, claimed for the Federal courts the right to interpret, because, as he

contended, those sections having passed as required had never been construed till after Stanly County issued its bonds in 1889, and that the Supreme Court of North Carolina placed an erroneous interpretation upon them.

THERE WERE NO PRIOR DECISIONS PLACING A DIFFERENT CONSTRUCTION UPON SEC. 14, ART. 2 OF THE CONSTITUTION.

It appears that every judge or court called upon, up to the present time, to construe art. 2, sec. 14, of the Constitution of North Carolina, has concurred in the ruling of the Supreme Court of that State in declaring its language to be mandatory, and its requirements indispensable prerequisites to the validity of any statute purporting to confer the power upon counties of creating debts outside of those for the ordinary or necessary expenses of the municipality. The ruling of Judge Purnell, that the decisions of the Supreme Court of North Carolina prior to that in *Bank* v. *Commissioners*, 119 N. C., 214, had been in conflict with it, is fully met by the discussion of that subject in the opinion of the Circuit Court of Appeals in *Commissioners* v. *Coler & Co.*, *supra*, except as to *Gatlin* v. *Tarboro*, which was not mentioned in his opinion.

The Court said:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina inconsistent with the decisions of that Court in the cases of *Union Bank of Richmond* v. *Commissioners of the Town of Oxford*, and the *Board of Commissioners of Stanly County et. al.* v. *Snuggs*, *supra*, which had become rules of property, and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and in our opinion that Court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we

have last mentioned. It is true that in some instances the language used by the Court is misleading in its tendencies, and even susceptible of the said constructions so placed upon it; but a careful consideration of the cases, and of the facts to which they relate, forces the conclusion that the Court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of art. 2, sec. 14, of the Constitution of the State of North Carolina.

"In *Carr* v. *Coke*, 116 N. C., 243, the Supreme Court held that the certificates of the presiding officers is conclusive that the bill has passed, but that the case does not decide that such certificate is proof that the yeas and nays were entered upon the Journal; that question was not then before the Court, and that decision should be considered in the light of the facts under which it was written.

"In *Broadnax* v. *Groom*, 64 N. C., 244, the matter discussed and decided had reference to art. 2, sec. 12, of the Constitution, which is in the following words: 'The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction and in such manner as shall be provided by law.' The question was whether the courts would go behind the signatures of the presiding officers in order to ascertain if certain preliminary matters had been complied with, and the result reached was that the courts would presume that the Legislature had ascertained that the notice required had been given, and that the certificate of the presiding officers must be regarded as conclusive of the subject.

"The case of *Scarborough* v. *Robinson*, 81 N. C., 236, relates to art. 2, sec. 23, of the Constitution, which reads as follows: 'All bills and resolutions of a legislative nature shall be read three times in each House before they pass into law, and shall be signed by the presiding officers of

both Houses.' The question was if the proper construction of said section would admit of the enforcement, as a law, of a bill which had passed both Houses of the General Assembly, but had not been signed by the presiding officers. The decision was that such a bill was incurably defective.

"In *State* v. *Patterson*, 98 N. C., 660, 4 S. E., 350, the Supreme Court construed art. 2, sec. 21, which is as follows: 'The style of the acts shall be, The General Assembly of North Carolina do enact.' Judge Merrimon, in delivering the opinion of the Court, said: 'More particularly for the present purpose when the Constitution prescribes and directs, in terms or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of government (as the Legislature), or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction can not be disregarded. A due observance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. It is not the nature of constitutions of governments to provide non-essentials—useless, unimportant details, such as may be disregarded and dispensed with. As we have said, they are organic, made upon solemn consideration by the sovereign authority, and contain general, essential provisions. Details are avoided in them, unless deemed important—essential. Non-essential details are left in the discretion of those who exercise and administer the powers of government. If this were not so, why prescribe the way and manner? Why not leave these things to convenience, and the authority charged with the exercise of the power? Why direct them? Why restrict them? And if such directions may be disregarded, ignored, suspended in some respects, then to what extent, and in what respect? If one coordinate branch of the govern-

ment, or any class of officers, may do so, why may not another, and all, as to duties devolved upon them, respectively, directly by the Constitution? The answer to these and like questions must be that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act can not be complete, such thing is not effectual until done in the way and manner so prescribed.'" "This case was decided December 5, 1887, and indicated clearly the absolute necessity of a strict observance of all the requirements of the Constitution in the matter of enactment of laws, and is in entire harmony with the later decisions of that Court, now the subject of criticism by counsel in connection with the question under consideration.

"The case of *Field* v. *Clark*, 143 U. S., 649, is not in conflict with the conclusion we reach. The particular subject we dispose of was specially pretermitted by the Court in that case, as follows: 'In regard to certain matters the Constitution expressly requires that they shall be entered on the Journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the Journal we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fulness shall be kept the proceedings of either House relating to matters not expressly required to be entered on the Journal, * * * these and like matters were left to the discretion of the respective Houses of Congress.'"

DIVISION OF STATE COURT DOES NOT ALTER THE BINDING EFFECT OF THE STATE DECISIONS.

Williams *v.* Eggleston, 170 U. S., 304 (L. C. Ed., book 42, p 1047).

Hence the dissenting opinion of Faircloth, C. J., in *Bank* v. *Commissioners*, 119 N. C., 214, is not authority to establish the proposition that there had been previous decisions of the Court inconsistent with the ruling in that case.

THE RULING THAT THE CODE OF NORTH CAROLINA, SECS. 1996 TO 2000, DID NOT AUTHORIZE THE CREATION OF THE BONDED DEBT OUGHT TO BE FOLLOWED BY THE FEDERAL COURT—

1. Because that ruling follows older decisions of the Supreme Court of North Carolina, rendered before the bonds in controversy were issued, and is in line with subsequent decisions, construing and applying secs. 1, 6 and 7 of art. 5 of the Constitution, which have already been quoted, but will be reiterated below for the purpose of comparing The Code provision with sec. 23, chap. 174 of the Laws of 1885, which was construed nearly five years before the bonds were issued in

Barksdale *v.* Commissioners, 93 N. C., 473, 486, 487.

Sections 1996 to 2000 of The Code are as follows:

Sec. 1996.

"The Boards of Commissioners *of the several counties shall have power to subscribe stock* to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Sec. 1997.

"The Board of Commissioners of any county proposing to take stock in any railroad company shall meet and

agree upon the amount to be subscribed; and if a majority of the board shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the Board of County Commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, *the Board of County Commissioners, through their chairman, shall have power to subscribe* the amount of stock proposed by them, and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies: *Provided*, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or moneys, as they may think proper."

Sec. 1998.

"All election ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the Boards of County Commissioners*, who shall make a record of the same."

Sec. 1999.

"In case *the county* shall subscribe the amount proposed in bonds, *the Board of Commissioners shall have power* to fix the rate of interest, not to exceed the rate of 8 per cent, when the interest on said bonds shall be payable, and at what place; and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

Sec. 2000.

"The taxes authorized by the three preceding sections, to be raised for the payment of interest or principal, shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the County Treasurer, to be used by the chairman of the Board of County Commissioners as directed by this chapter."

On the 11th of March, 1885, an act was ratified, which is published as chap. 174 of the Laws of 1885, sec. 23 of which act is as follows:

"Sec. 23. Sec. 2590 of The Code is amended to read as follows: 'If the tax levied by the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district for the period of four months, then the Board of Commissioners of each county shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools for the said period of four months or more. The said tax shall be collected by the sheriff in money, and he shall be subjected to the same liabilities for the collection and accounting of said tax as for other taxes. The said tax shall be levied on all property, credits and polls of the county; and in the assessment of the amount on each the commissioners shall observe the constitutional equation of taxation; and the fund thus raised shall be expended in the county in which it is collected, in such manner as the County Board of Education may determine, for maintaining the public schools for four months at least in each year."

The pertinent sections of art. 5, above mentioned, are as follows:

"Section 1. The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash. * * * The State and county capitation tax combined shall never exceed two dollars on the head."

"Sec. 6. The taxes levied by the commissioners of the several counties shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose and with the special approval of the General Assembly.*"

"Sec. 7. Every act of the General Assembly *levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other.*"

At the October Term, 1885, of the Supreme Court of North Carolina, and nearly five years before the bonds were issued, the Supreme Court of North Carolina construed sec. 23, chap. 174 of the Laws of 1885, and declared that it was insufficient to authorize the Board of Commissioners of Sampson County to levy a special tax, in order to raise a fund sufficient to maintain the public schools in said county for four months in the year. Although it was provided in the State Constitution that "one or more public schools shall be maintained at least four months in every year, and, if the commissioners of any county shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment" (art. 9, sec. 3), the Court held that a levy under the Act of 1885 for such purpose was unauthorized. The said statute is copied above.

The general power is given in The Code (sec. 1996) to "the Boards of Commissioners of the several counties", in the Act of 1885 to "the Boards of Commissioners of each county." The Code empowers "the Board of Commissioners" (after authorizing it to fix rate and interest, time of payment of bonds, etc.), *to raise by taxation from year to year the amount necessary to meet the interest on said bonds* (sec. 1997). The Act of 1885 provides that "the Boards of Commissioners of each county *shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools for said period of four months or more.*" Sec. 2000 of The Code provided that the

taxes should be collected "in *like manner as the State taxes*" (which are paid for the most part on property, including credits and polls of the county). The statute provides for a levy on "property, credits and polls of the county."

THE STATUTE HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF NORTH CAROLINA IN BARKSDALE V. COMMISSIONERS, 93 N. C. 472, 475, IN THE YEAR 1885, IS SUBSTANTIALLY SAME IN TERMS AS THE CODE, SECS. 1996 TO 2000.

The Supreme Court of the State, passing upon the constitutionality of the words of the Act of 1885 (chap. 174, sec. 23), containing essentially the same provisions as the sections of The Code—said (*Barksdale* v. *Commissioners*, *supra*, at its October Term, 1885):

"The levy finds no support in sec. 6, art. 5, for this is not one for '*a special purpose* and with the *special* approval of the General Assembly' for *county purposes*. The enactment is, in general, *applicable to the whole State*, and part of the general State legislation in furnishing facilities for the education of its people. *It can not find shelter* under any of the numerous adjudications sustaining the power to tax beyond the assigned restraints, and in disregard of the established ratio between State and county taxation, which will be found at the foot of the section":

"This form of taxation is local as well as special, and such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained.

"Broadnax *v.* Groom, 64 N. C., 244.
"Simmons *v.* Wilson, 66 N. C., 336.
"Mauney *v.* Commissioners, 71 N. C., 486.
"Trull *v.* Commissioners, 72 N. C., 288.
"French *v.* Commissioners, 74 N. C., 692.
"Cromartie *v.* Commissioners, 87 N. C., 134."

"These cases settle the extent of the taxing power when exercised by the county authorities, and allow its restraints only to be disregarded when the tax is needed to meet obligations existing before the Constitution by virtue of the Constitution of the United States, etc. * * * But as the repugnance of the provisions under consideration is manifest, the commissioners must refrain from assessments, however necessary for schools, which pass the bounds of conferred power." The language which the Court said would be found at the foot of the section is: "except for a *special purpose* and *with the special approval* of the General Assembly."

The authority to levy a tax was conferred in the Act of 1885 upon "the Board of Commissioners of each county"; and this was held unconstitutional, not because *it appeared, whether the tax would exceed the limit, but* because it *was not special* in *pointing out the specific county*, nor *local* in *confining the authority to a specific municipal* corporation or county, so that the representatives of the community affected would have notice. Did not every purchaser of a bond issued in 1890 have notice of this decision as a part of the laws of the State? It recited the sections of The Code, where the authority purported to be given to "the commissioners of the several counties" to subscribe and to the "Board of Commissioners of any county" to order an election, followed by sec. 1999, purporting to vest the power to levy a tax for schools (not for the ordinary expense of the counties)—a tax which the Legislature could not delegate the authority to levy without a valid provision in the statute granting the right to levy

Cons. Lim., art. 5, sec. 7.

In *Board of Education* v. *Commissioners*, 111 N. C., 579, the Court again construed sec. 23, Laws of 1885, and adhered to the older ruling. The Court said, at page 580:

"It appears from an examination of the authorities that no case has ever come before the courts involving the exercise of this *special power* of taxation by the counties, except *upon special* or *private acts* for local objects, *until the Act of 1885 was brought* to our attention." It thus appears that the Court has constantly and persistently construed sec. 6, art. 5 of the Constitution in the same way.

In the same opinion (111 N. C., at p. 580) the Court said: "It is well settled, that for the *ordinary expense* of the government, both State and county, the first section of art. 5 of the Constitution places the limit of taxation and preserves the equation between capitation and property."

In *Board of Education* v. *Commissioners*, 107 N. C., 110, 113, Chief Justice Merrimon, for the Court, said: "And moreover, the several counties can levy taxes to meet the *ordinary expenses of the county government* within the limitation of taxation mentioned." The utmost latitude allowed by the Court in the enactment of these laws providing for the levy of taxes above the constitutional limit or for other purposes than the ordinary expenses of the counties, is, that the Legislature is not bound under the ruling in *Broadnax* v. *Groom*, 64 N. C., at page 248 (which has been discussed in another connection) "*to set out the precise sum*" to be raised by the levy.

In *Vaughan* v. *Commissioners*, 117 N. C., at page 434, the Court said: "It is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of necessary expenses of a municipal corporation."

Satterwaite *v.* Commissioners, 76 N. C., 154.

The terms "ordinary" and necessary expenses are thus used to mean the same thing.

In the case of *Commissioners of Buncombe County* v.

Payne, 123 N. C., at page 488 (after referring to art. 5, sec. 6, of the Constitution): "A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid, especially when (as is the case here) it is necessary to exceed the constitutional limitation to pay interest or principal."

Tate *v.* Commissioners, 122 N C., 812 (at p. 815).
Herring *v.* Dixon, *Id.*, 420 (at p. 424).

Barksdale's case did not depend upon the question whether the limit would be exceeded in any given case. It was held sufficient, as in our case, that it might become necessary to exceed it.

In *Tate* v. *Commissioners* the Court said (referring to older adjudications cited in *Herring* v. *Dixon*, *supra*): "For other purposes than necessary expenses a tax can not be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority."

It is provided in art. 7, sec. 7, of the Constitution, that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officer of the same, except to meet the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

These adjudications had established as the settled construction of the Constitution of North Carolina by its highest court before July 1, 1890:

1. That no debt could be created by a county, except for its "necessary" or, what was *declared to be synonymous*, its "*ordinary*" expenses.

2. That a subscription to the capital stock of a railway company, like a levy for schools, is not an ordinary or necessary county expenditure.

3. That a tax levied to meet a bonded debt, created by such subscription, is a special tax, the levy of which is imperatively required by sec. 7, art. 5, to be provided for in the act authorizing the creation of the debt, and which, under the mandate of art. 5, sec. 6, *supra*, can not be *imposed without express authority specifically conferred on a particular county or other local agency of the State.*

LATER DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA CONSTRUE ART. 5, SECS. 1, 6 AND 7 IN THE SAME WAY.

The construction placed upon those provisions of the Constitution in *Barksdale* v. *Commissioners*, *supra*, was overlooked by Judge Simonton in his opinion in the Circuit Court, though called to his attention in the argument. After Judge Simonton had overruled the opinion of the Supreme Court, delivered by Justice Montgomery, in *Commissioners* v. *Snuggs*, 121 N. C., 394, 400, 401 *et seq.*, as to the interpretation of secs. 1996 to 2000 of The Code, the Supreme Court of North Carolina saw fit in a subsequent decision, construing the same sections, to place their ruling upon the further ground that such general acts did not authorize the creation of the debt or the levy of the tax, and were therefore void.

At the session of the Court in which the Wilkes County bonds were declared invalid, in *Commissioners* v. *Call*, 123 N. C., 308, in passing upon the question whether those sections authorized the creation of the bonded debt of Buncombe County, the Court said:

"*A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid*, especially when it is necessary to pay interest or principal.

"Tate *v.* Commissioners, 122 N. C., 812 (at p. 815).

"Herring *v.* Dickson, *Id.*, (at p. 424)."

Commissioners *v.* Payne, 123 N. C., 488.

THE FEDERAL COURTS ARE BOUND TO FOLLOW THE RULING OF THE APPELLATE COURT OF THE STATE AS TO WHAT WERE ITS DECISIONS AT A SPECIFIED TIME.

The authorities already cited, especially *Amoskeag Nat. Bank* v. *Ottawa*, *supra*, and *Leiper* v. *Texas*, *supra*, established the proposition that the Federal courts are bound to accept the ruling of the highest State Court, as to what are, or what are not, statutes in force or valid statutes of the State. Upon the same principle the Federal courts must accept as true the judicial declaration of the highest court of a State as to what was its ruling upon a particular point at a specified time. The laws of comity, as well as reason and public policy, forbid that the Supreme Court of the Federal Government should say in its opinion, overruling the State tribunal, "you thought you knew what you had decided, but you are mistaken."

The Supreme Court of North Carolina held, in *Barksdale* v. *Commissioners*, at the October Term, 1885, that a general act almost in *totidem verbis* with The Code provision, secs. 1996 to 2000, was unconstitutional and void, for failure to meet the requirements of art. 5 of the Constitution. This ruling was made five years before the bonds in controversy were issued. Eight years after they were issued, in passing upon the question whether these provisions of The Code authorized the issue of bonds, the Court, in *Commissioners* v. *Payne*, 123 N. C., 488, declared that any such act was "*invalid*," not simply as authority for levying a tax, but as "*authorizing * * * all counties to issue bonds for railroad purposes.*" If the Federal courts assume that the State Court knew what its own decisions were, they must conclude that it is the "settled decision" of that Court that general statutes, like those under consideration, are in conflict with its Constitution. This being a question that "relates to the internal Constitution of the

body politic of the State," the ruling of the State Court must be followed.

Claiborne *v.* Brooks, 111 U. S., 410.

It having been decided by the State Court that such statutes are invalid unless both "*local and special*," we take it for granted that even the eminent counsel will not be heard to discuss the questions whether this settled line of decisions, which was the *lex loci contractus* when the bonds were issued, is "sound in principle."

THE RULING AS TO THE SECTION OF THE CODE SHOULD BE FOLLOWED ALSO BECAUSE IT FOLLOWED A PRIOR DECISION CONSTRUING A SIMILAR PROVISION IN THE CONSTITUTION IN REFERENCE TO STATE SUBSCRIPTION TO THE STOCK OF RAILWAY COMPANIES, IN GALLAWAY V. CHATHAM R. COMPANY, 63 N. C., 147, 155, 156.

Constitution of North Carolina—"Art. 5, sec. 4. Until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, *unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power* to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of the Constitution, or in *which the State has a direct pecuniary interest*, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

Judge Purnell erroneously held that the case cited (*Gallaway* v. *Railroad*) was overruled by *Bank* v. *Commissioners, supra.*

That action was brought to test the validity of a sub-

scription provided for in an act passed after the ratification of the Constitution, on April 24, 1868.

After referring to all of the restrictive clauses of the Constitution (among them to art. 2, sec. 14), and declaring that the evil intended to be remedied was the creation of State indebtedness (1) by subscribing to the stock of railroad and navigation companies; (2) by exchanging State bonds for bonds of such corporations; (3) by indorsing the bonds of such corporations and making a mortgage or some other collateral security for indemnity, Chief Justice Pearson (at p. 155 of 63 N. C. R.) said:

"The suggestion that the credit of the State was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun, and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that has been done. There is no evidence that such was the fact in regard to this road.

"The other suggestion, that the State has a direct pecuniary interest in this road, was properly abandoned. The word *has* is in the present tense; the exception is obviously confined to roads in which the State had a *direct pecuniary interest at the time of the adoption of the Constitution;* otherwise the State might, by a *subscription of stock, become directly interested in every railroad or navigation scheme that should thereafter be projected; and thus the restrictions of the Constitution would be of no effect whatever.*

"Our opinion is that the *statute under consideration is void, and that the General Assembly had no power to pass it without* submitting the subject to a vote of the people.

"In making this decision we are relieved in some measure from our feeling of responsibility by the fact that if

the public interest imperiously calls for the construction of this road the Constitution provides that it may be done if such be the will of the people."

THE WILKESBORO LINE WAS NOT AN UNFINISHED ROAD.

The construction of the Wilkesboro line was first specially provided for in the Act of February 20, 1879. (See sec. 1 of that statute, p. 29 of printed record.) Before that time the original company had only general authority to build from Greensboro to Winston and to some point on the Virginia line. In passing upon the question whether it was an unfinished road the Supreme Court of North Carolina said (in *Commissioners* v. *Call*, 123 N. C., bottom p. 324):

"It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. This branch was an unfinished road then only in the sense, as was said by Rodman in his concurring opinion in *Gallaway* v. *Chatham R. Co.*, *supra*, that "It had never been begun."

Justice Rodman, concurring, said:

"The Chatham Railroad, *between the termini and the route established by previous legislation*, was an unfinished road in the legislative meaning of the phrase; but the road which was to start from one of the termini of the Chatham Road, or from some point on it, and thence run to Cheraw, was a road which was unfinished in the sense that it had never been begun, but not in the sense contemplated by the Constitution, which meant only to include those roads which *had been begun, but were unfinished at its adoption*. We are obliged to give this meaning *to that phrase in the Constitution, as any other construction would render it totally ineffective, and defeat any policy which it may be supposed it was* intended to enforce."

Discussing this subject Justice Douglas said:

"If the word 'uncompleted' can refer to any road *not yet begun*, and the word 'interest' applied on mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the *several counties may go on forever subscribing unlimited amounts to any railroad in esse or in futuro that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution, by making its explicit restrictions vain and worthless.* It can not be adopted by us, but, if we were forced to adopt it we would equally be forced *to declare those sections null and void.* If they mean that, they have no place upon the statute books. *While the Legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provision of the Constitution and subject to its restrictions, it can not by a sweeping act of unlimited application utterly destroy its operation.* If the Legislature or the railroad company or the county had placed any such construction upon these sections, additional legislation would have been deemed useless, and the recital in the bonds would have been different. It is true that this road *had been begun* and was in one sense *uncompleted when the subscription was* made, but it was *not begun when the Constitution was ratified*, and the *county at that time had no pecuniary interest in it nor* any interest contemplated by the statute."

Commissioners *v.* Call, 123 N. C., at page 324.

It thus appears that the ruling of the Court rested upon the view, first, that such statutes as the Act of 1869 brought forward in The Code were invalid, as was held in Barksdale's case and in *Commissioners* v. *Payne*, *supra*, unless they applied in terms to specific counties and particular corporations; second, that the branch from Win-

ston to Wilkesboro was a line not begun when the Constitution was ratified, on April 24, 1868, though work may have been done before that date between Greensboro and Winston, because any other construction would leave a loop-hole for extending privileges to any new road chartered after 1868, if made to connect with an old line and called a branch of the line begun before that day.

THE CONSTRUCTION PLACED UPON THE CODE SECTIONS BY THE COURT SHOULD BE FOLLOWED BECAUSE IT IS REASONABLE. —"INTEREST" DEFINED.

An interest generally is a legal concern of a person in a thing or in the conduct of another person, whether it consists in the right of enjoyment of or benefit from property, or right to claim an advantage or be subjected to liability on account of the conduct or management of property.

In other words, an interest is either a legal right in a thing as property, or such a relation to it as to enable one to participate in the profits of its conduct or management or share in the loss arising from its managemnent.

INTEREST MEANS PECUNIARY INTEREST.

The Code sections could not apply to the present case, because the Yadkin Railway Company had not begun to construct the Wilkesboro branch of its road, and had not located said branch until long after the ratification of the Constitution of 1868. The words "direct pecuniary interest" have been construed by the Court in *Galloway* v. *Railroad*, 64 N. C., at pages 155, 156 and 158. The Court, in *Commissioners* v. *Snuggs*, *supra*, construed sec. 1996 of The Code to refer only to a direct pecuniary interest in a road unfinished in 1868, when the act was first passed. Authorities from many courts can be cited to show that the word "interest" in such a connection as used in that section implies, *ex vi termini*, a pecuniary interest, which it

must be conceded the county of Wilkes did not have in 1887 to 1889.

Taylor *v.* Norment, 88 Ill., 527.
McGrath *v* People, 100 Ill., 464.
Wilson *v.* Railroad, 67 Ala., 358, 360.
In re Estate of White, 37 Cal., 100.
Shelton *v.* Derby, 27 Cown , 414, 421.
Smith *v.* Phillips, 54 Ala., 8.
Phillips *v.* Smith, 62 Ala., 578.
Lenter *v.* Almeda County, 45 Cal., 7.
State *v.* Eastern R. C., 36 N. J. L., 184.
Shelton *v.* Derby, 27 Conn., 415—425.

The contract was made in contemplation of the decision in *Gallaway* v. *Railroad*, *supra*, which the Court in *Commissioners* v. *Snuggs*, *supra*, had construed similar language in the Constitution, and that the Act of 1868 was intended to restrict counties as the State was restricted to roads unfinished on April 24, 1868, when it is not pretended that work had been begun on the line. But the Court say that interest means pecuniary interest, and in that respect its construction is in accord with the current of authority elsewhere.

Supposing, then, that the commissioners had relied solely upon this view, would the Supreme Court treat the State Court with so little consideration as to say that the question is not even balanced with doubt? True we do not think it is necessary to pass upon that construction, because the statute as held in *Commissioners* v. *Payne*, 31 S. Rep., following *Barksdale* v. *Commissioners*, fails to meet the demands of sec. 6, art. 5 of the Constitution.

THE COURT IS BOUND TO FOLLOW THE RULING IN COMMISSIONERS V. CALL, 123 N. C., 308. THAT THE COUNTY WAS NOT AUTHORIZED TO CONTRACT TO PAY THE BONDS BY THE ORIGINAL CHARTER OF MARCH 9TH, 1868. IT WAS ESSENTIAL THAT A VALID ENABLING ACT SHOULD HAVE BEEN PASSED AFTER APRIL 24TH 1868.

The authority conferred by the charter became nugatory as to any contract of subscription made by municipal corporations after the 24th of April, 1868, and also as to contracts not completed at that date.

Norton *v.* Brownville, 129 U. S., pages 479 to 493.
Aspinwall *v.* Commissioners, 22 Howard, 364.
Wadsworth *v.* Supervisors, 102 U. S., 534–553.
Railroad *v.* Faulkiner, 103 U. S., 821.
Faulkiner *v.* Railroad, 69 N. Y., 491 (cited in Norton *v.* Brownville, *supra*, at p. 490).
Town of Louisville *v.* Portsmouth, etc., Bank, 104 U. S., pages 469–479.

"These cases (said Chief Justice Fuller, in *Norton* v. *Brownsville*, *supra*, referring to *Concord* v. *Portsmouth Savings Bank*, 92 U. S., 625; *Falconer* v. *Railroad*, *supra*; *Railroad* v. *Falconer*, *supra*: *Wadsworth* v. *Supervisors*, 102 U. S., 534–537; and *Aspinwall* v. *Commissioners*, 22 Howard, 364), sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the Legislature, and a constitutional inhibition upon the municipality itself. In the former case past legislation is not necessarily affected, while in the latter case it is annulled." This was said in construing a provision in the Constitution of the State of Tennessee, substantially the same as sec. 7, art 7 of the Constitution of North Carolina, ratified April 24, 1868. If the inhibition contained in art. 7, sec. 7, in sec. 14, art. 2, and in art. 5, secs. 6

and 7. were self-executing and operated directly upon the counties, then it is clear that on the 24th of April, 1868, the charter granted by the Constitutional Convention on the 9th of March, 1868, was nugatory as authority to the Board of Commissioners to create a bonded debt in the face of the first two inhibitions as well as for the reason that the subscription involved the levying of a tax not "for county purposes" (held to mean the "ordinary expenses" of the county), but for "a special purpose," which required a new act granting "the special approval of the General Assembly," which must be both "local and special" in its application.

Barksdale *v.* Commissioners, 93 N. C., 472–475.

THE SUPREME COURT OF NORTH CAROLINA HOLD THAT THE CHARTER, IF THE POWERS GIVEN IN IT HAD NOT BEEN REVOKED ON THE RATIFICATION OF THE CONSTITUTION OF 1868, DID NOT BY ITS TERMS CONFER AUTHORITY ON WILKES COUNTY TO SUBSCRIBE TO THE CAPITAL STOCK OF THE RAILROAD COMPANY.

BOTTOM OF PAGE 312, *et seq.*

"But is is urged that while the bonds were expressly issued under the Act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority to issue said bonds derived from an ordinance of the Constitutional Convention, passed in 1868; and that, therefore, we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of the company or the issuing of the bonds, is as follows:

"'Sec. 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of $100.' 'Sec. 12. Be

it further ordained, that the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the Board of Directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.' That said ordinance can not be relied on to support the validity of the bonds at issue is apparent for several reasons: First, we do not see that any authority whatever is given or attempted to be given by either of these sections to Wilkes County to subscribe to the capital stock of this company. But it is said that sec 12, by referring to the charter of the 'North Carolina and Atlantic Railroad Company,' by which we presume is meant the Atlantic and North Carolina Railroad, chap 136 of the Laws of 1852, confers upon the different counties, through or near which the Northwestern North Carolina Railroad may run, the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the Act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe 'shall do so in the same manner and under the same rules, regulations and restrictions, as are prescribed in the former act. The words 'same restrictions' are peculiarly significant here, as the Act of 1852, sec. 45, provides in express terms that 'if the said road be not completed within six years after the ratification of this act, this charter shall be forfeited. Therefore, even if the powers granted in the Act of 1852 had been given to the Northwestern North Carolina Railroad Company or the counties in its interest, sub-

ject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise, 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be held to be in the nature of a limitation and not a condition subsequent. That is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power."

123 N. C., bottom page 318.

NONE OF THE AMENDMENTS TO THE CHARTER SUPPLIED THE POWER REVOKED BY THE CONSTITUTION ON APRIL 24TH, 1868.

The Act of February 20, 1879 (p. 29 printed record) did not supply the revoked power, because,

1. It was not passed in the mode prescribed in sec. 14, art. 2, and was therefore "no law."

Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., *supra.*

2. Sec. 4 of said act (printed record, p. 29) provided "That any township or city, town, county or other municipal corporation of this State shall have power and authority to subscribe bonds and take any number of shares of capital stock of said company that a majority of the voters of such township, or city, town, county or other municipal corporation may elect to take therein." It was decided by the Supreme Court of North Carolina, as has already been stated, by a line of decisions beginning five years before and extending up to eight years after the bonds were issued, that such a general statute applying to all of the townships, cities, towns and municipal corporations of the State, did not constitute authority for creat-

ing a bonded debt by any particular corporation in order to pay for stock in a railway company.

Barksdale *v.* Commissioners, *supra.*
Commissioners *v* Call, *supra.*
Commissioners *v.* Payne, *supra.*

The authority was not conferred by sec. 3 of the Act of March 2, 1881 (printed record, p. 31),

1. Because that act was not passed in the manner prescribed by the Constitution.

2. Because the provision that "any corporation, county, city, town or township interested therein may subscribe to stock for said purpose, or otherwise contribute to such work, in such manner as shall be determined by the proper authority of such corporation, county, city, town or township, and agreed on with the said Northwestern North Carolina Railroad Company," was fatally defective in that it purported to authorize municipal corporations to pledge their faith and create debts for purposes other than for necessary expenses of a county, without first obtaining the consent of a majority of the qualified voters of such municipal corporation by submitting the question of subscription to be voted upon. The act is invalid as an attempt to confer the authority also because it failed to specify any particular municipal corporation and therefore subject to the objection that it is too general in its terms.

The Act of the Legislature of August 11, 1868 (p. 27, printed record), conferred no power on the county of Wilkes to create a bonded debt, because—

1. The extracts from the printed Journals (printed record, pp. 40 and 41), agreed by counsel to be a correct history of legislative action (p. 34 of printed record), show that the said act was not passed in accordance with the mandatory requirements of sec. 14, art. 2 of the Constitu-

tion. Any provision of said act, therefore, which purported by ratifying said act or in express terms to empower municipal corporations to create bonded indebtedness was null and void, as has been held by the Supreme Court of North Carolina, Judge Simonton, in the Circuit Court of Appeals; indeed, by every tribunal, except District Judge Purnell, in the Circuit Court at Greensboro.

2. Because it purported by its terms to ratify and confirm only "*the acts and things heretofore done under the provisions of said ordinance*," and if it had not been void for failure to pass in the prescribed way, could not operate to ratify prospectively any act of the county of Wilkes.

3. It was provided by sec. 2 of said act "That all the right, powers of authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, on the Justices of the Peace of Forsyth County or on the CountyCourt of said county, be and the same are hereby conferred on the commissioners of said county."

THERE HAD BEEN NO DECISION BEFORE THE OPINIONS WERE FILED IN BANK V. COMMISSIONERS, 119 N. C., 214, AND IN COMMISSIONERS V. CALL, 123 N. C., 308, WHICH WERE ADVERSE TO THE VALIDITY OF THE WILKES COUNTY BONDS ISSUED IN 1890.

This case is distinguishd from *Folsam* v. *The Township of Ninety-six*, 159 U. S., 611, in that in Folsam's case it was admitted that the Supreme Court of South Carolina, after the township bonds were issued, had overruled a former decision favorable to the validity of the bonds. In our case the Supreme Court of North Carolina have reiterated the statement in all of the cases cited in the certificate, that the Court had never at any time before the bonds were issued rendered any decision in conflict with *Bank* v. *Commissioners*, 119 N. C., 214. The binding effect

of such a declaration in the opinions of the Court is not altered by the fact that a minority of the Court differed with the majority upon this question.

Williams *v.* Eggleston, 170 U. S., 304.

The provisions of the Constitution of 1868 do not apply where the contract of subscription was complete before the restrictive provisions of the Constitution became operative, on April 24, 1868.

Norton *v.* Brownesville, 129 U. S., 479, 493, and other authorities cited, *supra*.

THE SUBSCRIPTION OF FORSYTH COUNTY HELD VALID IN HILL V. COMMISSIONERS, 67 N. C., 367, AND IN BELO V COMMISSIONERS, 76 N. C., 489. WAS MADE BEFORE APRIL 24TH, 1868, AND NO EVIDENCE WAS OFFERED IN EITHER OF THOSE CASES AS WAS DONE ON THE HEARING IN THIS CASE TO SHOW THAT THE ACT OF AUGUST 11TH, 1868, WAS NOT ENACTED AS REQUIRED BY CONSTITUTION OF NORTH CAROLINA, ARTICLE 2, SECTION 14.

1. Justice Furches, in his dissenting opinion in *Commissioners* v. *Call*, 123 N. C., at page 330, said:

"It is true that the submission of this question in Forsyth was made by the justices of the peace acting as a County Court. And it is true that the charter provides that the question should be submitted by them. But this charter was passed and this submission was made and bonds issued before the adoption of the Constitution of 1868, which did not go into effect until the 22d of April of that year."

It appears that in *Hill* v. *Commissioners* the sole question raised was, whether, before the ratification of the Constitution of 1868, the Legislature had the constitutional power to authorize a subscription by a county to the capital stock of a railroad company. Justice Read said in the

opinion: "We suppose the plaintiffs' counsel felt at liberty to treat it as an open question, because, in *Caldwell* v. *Justices of Burke*, there was a dissenting opinion by the present Chief Justice; but the Court was unanimous upon the point. The dissenting opinion was only as to the power of a second vote of the people after they had rejected the proposition by a former vote."

The Court had previously quoted, in the same opinion, from *Caldwell* v. *Justices*, 4 Jones Eq., 323 (decided at the June Term, 1858, of said Court), as follows: "In accordance with these views is the case of *Taylor* v. *New Bern*, *supra* (2 Jones Eq., 141), so that the question may be said to be settled here."

It must be admitted that the attempt to enter into the contract was made before the 11th of August, 1868, so that if the statute relied on as an enabling act had not been void for failure of the Legislature to comply with the requirements of art 2, sec. 14, of the Constitution, it would have been too late to attempt to confer the power after its exercise. The Act of 1868, if it was void (as we shall presently see it was, and is), could no more operate to ratify the previous exercise of such authority than as a grant of the power to create the debt.

2. In *Belo* v. *Commissioners* the Court place the decision upon two grounds, the first being that authority was given to the Commissioners of Forsyth under the original charter construed together with the Act of 1852 therein mentioned. To grant this would not affect the question of the right of Wilkes County to contract after April 24, 1868.

The Court, however, said in that case, *Belo* v. *Commissioners*, 76 N C., at page 497:

"But the plaintiff further relies upon a subsequent act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This act, in express terms, ratifies all acts and things heretofore done

under the provisions of said ordinance, and confers upon the Board of Commissioners of the county (Forsyth) full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the Northwestern North Carolina Railroad Company and interest due thereon, or to liquidate any debt created by the county in borrowing money to pay such stock subscriptions. * * * Declaring, as we do, that the ratifying Act of 1868 was a curative act, and validated both county subscriptions and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act—and the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law the bonds were valid, and the Court did not err in so declaring."

It follows from the facts stated and the authorities cited:

1. That the Act of August 11, 1868, upon proof that it was not passed in conformity to art. 2, sec. 14, of the Constitution, was void even as an enabling or curative act for Forsyth County. An act void as an attempted violation of the Constitution or of a statute can not be made valid by a second void statute purporting to cure the exercise of an unauthorized power.

Lowe *v.* Harris, 112 N. C., page 485, *et seq.*

2. That the statute purported to ratify only what had been previously done by Forsyth County, and under the strict rule of construction applicable to powers could not be held to operate prospectively on a county not named as donee of the power, and which did not attempt to exercise it till twenty-one years later, October 1, 1889.

3. That there had been no ruling by the State Court when the Wilkes County bonds were issued, October 1,

1889, that any subscription under the charter was valid, except that made by Forsyth County before the ratification of the Constitution, and which was authorized by a vote of the people on April 14, 1868 (twenty days before the ratification).

4. That if the reference to the charter of the Atlantic and North Carolina Railroad Company operated to incorporate the sections referred to into the original charter, and if it were granted also for the sake of the argument that the authority conferred did not expire by its own limitation in six years, the insuperable difficulty, which will be more fully discussed in connection with secs. 1996 to 2000 of The Code, would still remain, which is that after the ratification of the Constitution of 1868 no tax could be levied "except for a special purpose" (art. 5, sec. 6), which must be "stated in the act" (art. 5, sec. 7), and which must have been "local as well as special," viz: must have specified the municipal corporations in a particular locality which was to be clothed with the power to tax.

Barksdale *v.* Commissioners, 93 N. C., 472, 475.

A CONTRACT VOID BECAUSE UNCONSTITUTIONAL CAN NOT BE MADE VALID BY SUBSEQUENT RATIFICATION UNDER NORTH CAROLINA LAWS. CONTRACT OF A NORTH CAROLINA MUNICIPALITY—GOVERNED BY LEX LOCI CONTRACTUS.

The so-called curative Act of August 11, 1868, if it had not been enacted in the prescribed manner, and if it had by its terms purported to confirm any contract other than that made by Forsyth County, it could not, under the North Carolina decisions, have operated as a confirmation of a void contract.

The Act of August 11 does not purport upon its face to ratify any contract except that theretofore made by the county of Forsyth. The language is "and all acts and

things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed." Clearly heretofore meant before August 11, 1868, when the act was passed. The Forsyth County contract having been made, not in contemplation of, but prior to, the adoption of the Constitution of 1868, may have been subject to ratification, but it is settled law in North Carolina that a void contract can not be made valid and operative by an act of the Legislature, for the reasons (1) that such an act would be judicial legislation; (2) that it would impair the obligation of any contract that would be effected by imparting validity to the void statute.

Stanmire *v.* Taylor, 48 N. C., 297.
Stanmire *v.* Powell, 13 Ired., 312.
Lowe *v.* Harris, 112 N. C., 485, *et seq.*

In *Stanmire* v. *Taylor*, *supra*, the Court said: "If the Act of 1852 (declaring plaintiff's grant valid) was intended to give life to the void grant under which the plaintiff claimed the premises by giving a construction to it, the act was a judicial one, which it was not in the power of the Legislature to pronounce. If it be considered purely a legislative grant to the lessor of the plaintiff, then it violates the contract which it made with the defendant Taylor."

It has been held by the Supreme Court of North Carolina that the Legislature of North Carolina had no power by a remedial act to make valid a contract theretofore void because attempted to be made contrary to a prohibition of the Constitution, or of a statute, such as the statute of frauds, even though the contract was voidable, not void.

Lowe *v.* Harris, 112 N. C., at pages 485, 486.

If a contract made before the incorporation of art. 2, sec. 14, into the organic law (on April 24, 1868), could have

been made valid by confirmation or supplying a defective power (which is not admitted), such a contract could not, under the rulings in North Carolina, have been vitalized by statute when entered into in defiance of a plain constitutional restriction.

If the attempted agreement to pay the bonds was void, its invalidity grew out of the disregard of the constitutional inhibition in force when they were issued. To attempt to remedy that infirmity by a curative act would be a palpable effort to evade the prohibitory provision of the Constitution, as well as an invasion of the rights of a co ordinate branch of the government by attempting to decide upon the obligations of the taxpayers of the county to pay, and of its creditors to enforce by mandamus the payment of a large bonded debt, palpably void without legislation. Would it not be as clearly void after it was resorted to?

THE SECOND AND THIRD INSTRUCTIONS ASKED FOR.

The second inquiry is hypothetical and asks the Court to assume, what is not admitted, that there were no decisions of the Supreme Court of North Carolina adverse to these or identical bonds, when they came into the hands of the complainant, appellees, in due course of trade, for valuable consideration, and without notice. The third question asks the Court to judicially determine whether there was any decision adverse to the validity of these bonds, or identical bonds, or any construction of the Constitution or laws of North Carolina, which affected the question of their validity when they came in the due course of trade and for valuable consideration, and without notice (other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State) of their invalidity.

It is needless to waste time in determining what would

be the law, governing the case, if there had been no decision adverse to the validity of the bonds, if by beginning with the investigation of the third question propounded the Court shall be of opinion that the Supreme Court of North Carolina had in fact adjudicated questions upon which the validity of these bonds depended, before they were issued, and shall reach the inevitable conclusion thereupon, that all purchasers took with notice of any decisions of the Supreme Court of North Carolina which had been rendered before the contract was made and which entered into and formed a part of every such contract when made. Both of these inquiries, therefore, ought properly to be considered together.

DID A PURCHASER OF THE BONDS ISSUED IN 1890 CONTRACT IN CONTEMPLATION OF ANY CONSTITUTIONAL PROVISION, STATUTE OR DECISION OF THE SUPREME COURT OF NORTH CAROLINA, WHICH WAS SUFFICIENT TO PUT THEM ON NOTICE OF WANT OF AUTHORITY TO ISSUE THEM?

First, did they have notice that the provisions of sec. 14, art. 2 were mandatory?

The meaning of that section is an unambiguous, clear and unmistakable constitutional prohibition as to legislative actions, declaring that no law should be passed conferring certain authority upon municipal corporations except in the manner therein specifically pointed out. It is the general rule, that the use of negative words, in a Constitution or statute, is construed to indicate a legislative purpose to make its requirements mandatory, and this case does not fall within the exception to it.

24 Am and Eng. Enc. (1st Ed.), page 55, and authorities cited, n. 3.

The purchasers of these bonds had notice, when they took them, that neither the amendment of February 20, 1879, nor the amendment of March 2, 1881, nor the Act of August 11, 1868 (printed record, pp. 27 to 32), were passed in accordance with the requirements of sec 14, art. 2 of the Constitution.

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., *supra.*
> South Ottawa *v.* Perkins, and Supervisors *v.* Post, 94 U. S., 260.

The bearing of these decisions upon the case is not affected by the fact that the validity of the Oxford bonds had been sustained on the first appeal, when no evidence had been offered below as to the manner in which the enabling act was passed, because, when the Journals were offered upon the next trial, the question was for the first time raised and for the first time adjudicated in *Bank* v. *Commissioners*, 119 N. C., 214. The same point was decided by the Supreme Court of the United States in reviewing the construction of the similar provisions contained in the Constitution of Illinois. The Court said:

"Nor is it of any importance that the Act of 1857 had been assumed to be an existing law in *Dunavan* v. *Green*, 57 Ill., 53, and *Force* v. *Battavia*, 51 Ill., 99, for in each of these cases the validity of the statute was not controverted, and by established practice of the Court no evidence of the contents of the Journals could be considered on appeal which had not been produced and made part of the case in the Court below."

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., at page 667.

Precisely the same view of the same question was taken when art. 2, sec. 14, of the Constitution of North Carolina was first construed.

Bank *v.* Commissioners, 119 N. C., at page 220.
Gatlin *v.* Tarboro, 78 N. C., at page 128.

The case of *Bank* v. *Commissioners, supra*, had been previously heard in the Supreme Court (116 N. C., 239), but the Journals had not been offered in the first trial of the court below. At page 220, 119 N. C., the Court said: "We must take it that our former opinion settles that the town had authority to compromise a valid liability for a smaller sum, and that the Act of 1891, chap. 315, on its face authorized the election. When the second trial was had below the point was taken for the first time that, conceding, as the Court had held, that the Act of 1891, chap. 315, by its terms authorized the election, that act was invalid, because not passed as required for all acts empowering counties, cities and towns to issue bonds."

The purchasers of these bonds had notice of the following language in an opinion of the Supreme Court of North Carolina:

"More particularly for the present purpose, when the Constitution prescribes and directs, in terms or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of the government (as the Legislature), or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction can not be disregarded. * * * Requirements of the Constitution shall prevail and be observed, and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated *as a command* and an observance of it *essential to the effectiveness of the act or thing to be done*." The Court decided in that case that a statute was invalid without an enacting clause, because of the following provision in the Constitution of the State, in art. 2: "Sec. 21. The style of the

act shall be: 'The General Assembly of North Carolina do enact.' "

In the same opinion the Court held also that still another section of art 2 of the Constitution was mandatory, as had previously been held in *Scarboro* v. *Robinson*, *supra*, to-wit:

"Sec 23. All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

State *v.* Patterson, 98 N. C., 660, 662, 664.

If the commands contained in secs. 21 and 23 of art. 2 of the Constitution of North Carolina had previously been held to be mandatory, the purchaser of bonds issued in contemplation of this decision is assumed to know the law governing the construction of Constitutions and statutes, and therefore to have understood that a prohibitive provision contained in the same article of the same Constitution, in negative terms, was much more clearly mandatory, and that a little compliance with its requirements was more clearly essential to the validity of an act empowering municipal corporations to create debts.

23 Am. and Eng. Enc., *supra*.

We reiterate that according to the established rules of construction and the settled law of comity, Federal courts are bound to accept as true what the State courts say as to the status of their decision at a particular period. The question whether the contract had been impaired is determined by Federal courts upon the assumption always that the State appellate courts determines the meaning of its Constitution and laws. It follows inevitably that Federal courts must accept the declarations of the Supreme Court of North Carolina in *Bank* v. *Commissioners*, 119 N. C.,

214, that it had been already decided in *State* v. *Patterson*, 98 N. C., 660, that all of the sections of art. 2 of the Constitution of North Carolina, defining the duties of the Legislature, whether containing commands or prohibitions, were mandatory.

HAD THE SUPREME COURT HELD BEFORE THE BONDS WERE ISSUED THAT SUCH GENERAL STATUTES AS THE CODE, SECTION 1996 TO 2000, CHAPTER 136, LAWS OF 1852, SECTIONS 33, 34, 35, 36 (PRINTED RECORD, PAGE 31), AND SECTION 4, CHAPTER 13, LAWS OF 1879, WERE INVALID?

We have already seen that "a general act authorizing any and all counties to issue bonds would be invalid," under the decisions of North Carolina, rendered both before and after the bonds were issued in 1890.

Barksdale *v.* Commissioners, 93 N. C., at page 475.
Commissioners *v.* Payne, 123. N. C., 488.
Tate *v.* Commissioners, 122 N. C., 812, 813.
Herring *v.* Dickson, 122 N. C., 812, 815.

The provisions of The Code, the Act of 1852, incorporated by reference into the charter, and sec. 4, Laws of 1879, are general acts—are neither "*local*" nor "*special*"—and are therefore pronounced positively and unconditionally invalid in the cases above cited. The same doctrine is announced by Justice Douglas in passing upon the authority claimed under the original charter taken in connection with the Act of 1852, which the Court say, in a portion of the opinion already quoted, did not authorize the county of Wilkes to issue these bonds.

Commissioners *v.* Call, 123 N. C., at page 324.

THE CONSTRUCTION PLACED BY THE COURT UPON ARTICLE 5, SECTION 4, OF THE CONSTITUTION OF NORTH CAROLINA WAS ADVERSE TO THE CLAIM OF AUTHORITY TO ISSUE MUNICIPAL BONDS UNDER THE CODE, SECTION 1996 TO 2000.

Art. 5, sec. 4, of the Constitution is as follows:

"Until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State except to supply a casual deficit, or for suppressing invasion and insurrection, *unless it shall in the same bill levy a special tax to pay the interest annually.* And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the *completion* of such railroads as may be *unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest*, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon."

The action of *Gallaway* v. *Railroad*, 63 N. C., 147, was brought to test the validity of a subscription provided for in an act passed after the ratification of the Constitution, on April 24, 1868.

After referring to all of the restrictive clauses of the Constitution (among them to art. 2, sec. 14), and declaring that the evil intended to be remedied was the creation of State indebtedness (1) by subscribing to the stock of railroad and navigation companies; (2) by exchanging State bonds for bonds of such corporations; (3) by indorsing the bonds of such corporations and taking a mortgage or some other collateral security for indemnity, Chief Justice Pearson (at p. 155 of 63 N. C. R.) said:

"The suggestion that the credit of the State was given by this statute to aid in the completion of an unfinished

railroad was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun, and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that has been done. There is no evidence that such was the fact in regard to this road.

"The other suggestion that the State has a direct pecuniary interest in this road was properly abandoned. The word has is in the present tense; the exception is obviously confined to roads in which the State had a direct pecuniary interest at the time of the adoption of the Constitution; otherwise the State might, by a subscription of stock, become directly interested in every railroad or navigation scheme that should thereafter be projected; and thus the restriction of the Constitution would be of no effect whatever.

"Our opinion is that the statute under consideration is void, and that the General Assembly had no power to pass it without submitting the subject to a vote of the people."

"In making this decision we are relieved in some measure from our feeling of responsibility by the fact that if the public interest imperiously calls for the construction of this road, the Constitution provides that it may be done if such be the will of the people."

The Court, in construing the provisions of The Code, which were originally passed by the Legislature of 1868, and in furtherance of the systematic plan to throw safeguards around taxpayers against the danger of improvidently subjecting themselves to the burden of municipal debts, adverted to the decision in *Gallaway* v. *Railroad*, which was cited upon the argument, as tending to show that the subscriptions provided for in The Code could only be made to railroads incomplete when the Constitution of 1868 was ratified, and in which the counties had a pecun-

iary interest. In holding that the right to subscribe was limited to such roads, if conferred at all, the Supreme Court followed not only, as we have attempted to show, the true meaning of the language used, but the construction of the Constitution containing similar language and expressive of the policy of the people of the State at that period.

THE DECISIONS IN HILL V. COMMISSIONERS, 67 N. C., 367, AND IN BELO V. COMMISSIONERS, 76 N. C., 489, ARE NOT AUTHORITY BECAUSE THEY BOTH APPLIED TO A CONTRACT MADE BY FORSYTH COUNTY BEFORE APRIL 24TH, 1868, AND BECAUSE NO EVIDENCE WAS OFFERED ON THE TRIAL OF EITHER ONE OF THOSE CASES TO SHOW THAT THE ACT OF AUGUST 11TH, 1868, UNDER WHICH THE SUBSCRIPTION WAS HELD VALID WAS NOT ENACTED AS REQUIRED BY THE CONSTITUTION OF NORTH CAROLINA, ARTICLE 2, SECTION 14.

Justice Furches, in his dissenting opinion, *Commissioners v. Call*, 123 N. C., at page 230, said:

"It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a County Court. And it is true that the charter provides that the question should be submitted by them. *But this charter was passed and this submission was made and the bonds issued before the adoption of the Constitution of 1868, which did not go into effect until the 22d of April of that year.*" (The election of 1868, upon the adoption of the Constitution, continued from the 22d to the 24th of April, and the Constitution took effect when the election was over, on the 24th. The date should have been fixed by the learned justice at April 24).

Accepting the statement in the dissenting opinion, favoring the validity of the bonds now in controversy, the contract passed on in the two cases referred to above was not

inchoate but complete when the Constitution was adopted, and was therefore not subject to any of the restrictive provisions which then took effect. In so far then as the opinion rests upon the ground that the contract made before the 24th of April, 1868, was authorized by the original charter, it has no bearing upon the question whether contracts, like that under consideration, are valid under the original charter without additional authority conferred after the adoption of the Constitution.

In so far as the decision in *Hill* v. *Commissioners* rests upon the idea that the Act of August 11, 1868, operated under the Constitution to reenact those portions of the original charter which purported to authorize subscriptions by municipal corporations, it can not be held to govern the case at bar or to effect the validity of the Wilkes County bonds, for the reason, *first*, that Justice Bynum assumed in the opinion, as there had been no evidence to the contrary offered on the trial below, that the Act of August 11, 1868, was passed in conformity with the requirements of the Constitution, and it is therefore a matter of no importance that the Court assumed that the statute was "an existing law."

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., at page 667.

Second. That by its terms the statute purported to ratify and confirm any contract made by Forsyth County.

The same question arose as to offering the Journals in evidence when sec. 14, art. 2 was first construed by the Supreme Court of North Carolina.

> Bank *v.* Commissioners, 119 N. C., at page 220.

We have already set forth the substance of what was decided in *Hill* v. *Commissioners*, as we have also elaborated the position, that a void contract can not be made

valid under the laws of North Carolina, and, therefore, that the Legislature has no authority to give vitality to a contract void for want of conformity to the Constitution of 1868.

The burden is on the appellees to bring this case within the exception to the general rule by showing, either that the contract was made in contemplation of decisions of the State courts then in force, and which sustained its validity, but which were afterwards overruled, or second, that there was no decision construing a statute upon which its validity depended when the contract was made. We have shown that under the rulings in *State* v. *Patterson*, *supra*, in *Barksdale* v. *Commissioners*, *supra*, and, inferentially, if not directly, in *Gallaway* v. *Railroad*, the Court had passed upon provisions of the Constitution and statute, and that under those decisions purchasers of bonds had notice of the invalidity of the contract, whether the authority to make it is claimed under the one or the other of the five statutes filed as exhibits by the complainant.

If there had been no decisions, however, under the rule laid down in *Burgess* v. *Seligman*, 107 U. S., 20, the Federal courts must follow the construction placed by the highest court of a State upon its own statute, "if the question seems to them balanced with doubt." The general rule is recognized and fully stated in a number of later cases.

Forsythe *v.* Hannon, 166 U. S., 506, 518, 619, 620.

THE ATTACK UPON JUSTICE DOUGLAS IS ENTIRELY IRRELEVANT, AND INTENDED TO DIVERT ATTENTION FROM THE QUESTION AT ISSUE.

Affidavits were offered in the court at Richmond to show that a portion of a sentence incorporated in the copy of the opinion of Justice Douglas sent up, when this controversy

was brought by writ of error to the Supreme Court of the United States, was left in the opinion by mistake of the Clerk of the Court. But it is sufficient for present purposes to state that the appellants come before the Court sustained by the opinion of a majority of the Supreme Court of the State, which must be treated as the law of that State.

Williams *v.* Eggleston, 170 U. S., 304.

THE CHARGE OF COLLUSION IS LIKEWISE NOT PROVEN, BUT IS IMMATERIAL IF PROVEN.

Adams Ex. Co. *v.* Ohio State Auditor, 165 U. S., 194.

THE JURISDICTION OF THE STATE COURT SETTLED BY ITS DECISION.

It is a rule, not peculiar to the courts of North Carolina, that the Supreme Court will *ex mero motu* dismiss an appeal when it appears that the plaintiff's complaint does not state facts sufficient to constitute a cause of action.

Tucker *v.* Baker, 86 N. C., 1.
Johnson *v.* Finch, 93 N. C., 205.
Knowles *v.* Railroad, 102 N. C., 50.
McKinnon *v.* Morrison, 104 N. C., 354.

The Court here must assume that the Supreme Court of North Carolina, in entertaining *Commissioners* v. *Call*, *Commissioners* v. *Snuggs*, and *Commissioners* v. *Payne*, decided that a Board of Commissioners of a county had the right to bring suit to enjoin the treasurer of the county from paying the interest on a bonded debt of the county out of a special tax fund in his hands and collected for that purpose. But if it be necessary for a State Court to prove to a Federal tribunal that it did not err in asserting its own jurisdiction, under its own local laws, the Court is referred to a ruling of the Supreme Court of the State.

that when a treasurer makes an honest payment of taxes under an unconstitutional statute, the treasurer is not answerable personally, nor on his official bond, and the county is liable to suffer irreparable loss by such an application of its taxes.

Board of Education *v.* Commissioners, 113 N. C., pages 388, 389.

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